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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA

v.

RICHARD W. DOUGLAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on October 9, 1953, by the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (R. 516–521) is reported at 207 F. 2d 381.

JURISDICTION

The judgment of the Court of Appeals was entered October 9, 1953 (R. 521–2). By order of Mr. Justice Douglas dated January 7, 1954 the time for filing a petition was extended to February 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Federal Government undertook an irrigation project, pursuant to the Columbia Basin Project Act, for certain arid lands in the West, and under that Act the land was impartially appraised "without reference to or increment on account of the construction" of the irrigation project which would bring water to the land at a later date. The Act prevented the owner, for a period of years, from selling the land for a price in excess of the appraised value, and the owner so agreed. During the period this requirement was in effect, the land was condemned in its arid state by the Government for the use of the Atomic Energy Commission.

The question presented is whether just compensation for the taking can exceed the appraised price to which the owner was limited by the Act and his contract.

STATUTE INVOLVED

The material provisions of the Columbia Basin Project Act, as amended March 10, 1943, 57 Stat. 14, 16 U. S. C. sec. 835 *et seq.*, enacted to prevent "speculation in lands of the Columbia Basin project," a federal reclamation project in the Columbia River, are set out in the Appendix, pp. 14–17, *infra*.

Those provisions which are immediately pertinent are summarized as follows:

Section 2 (a) provided that before funds could be expended for construction of any of the irrigation features of the project, all lands within it were to be impartially appraised by the Secretary of the Interior "without reference to or increment on account of the construction of the project," and that reappraisals might be made at any time "and will be made upon request of the landowner."

Section 2 (b) required a landowner "as a condition precedent to receiving water from the project" to execute a recordable contract providing that, from the date of that contract to a date five years after water was delivered, he would not sell the land at more than the appraised value and would undertake in the event of its sale to file for recording within 30 days an affidavit stating the consideration and, third, that if the affidavit was not filed or the sale was made for a consideration in excess of the appraised value the Secretary could cancel the water right.

Section 3, first, punished fraudulent misrepresentation in the affidavit by fine or imprisonment or both; second, made a transaction for a consideration in excess of the appraised value unenforceable as to that part of the consideration and, third, gave the purchaser, if within two years of the transaction he filed a correct affidavit, the right to recover the excess payment together with court costs and attorneys' fees.

STATEMENT

On March 15, 1951, the United States filed a petition in condemnation (R. 3–6) and a declaration of taking (R. 6–8) covering about 650 acres in Grant County, Washington. The lands were among those needed for expansion of the Hanford Project of the Atomic Energy Commission.

Among the condemned lands were 162.87 acres owned by respondent (R. 128), the sole heir of his wife (R. 127). He and she had occupied the land from June 1912, to October 1913, in order to get a patent from the United States (R. 126). They had then moved because the land had no water (R. 496). In 1913 or 1914, Mrs. Douglas had received the patent (R. 37). The land has not been used since (R. 126, 246).

In the latter 1940's, respondent's land became a part of an area in the State of Washington which was to receive water from an irrigation project to be built under the Columbia Basin Project Act. Pursuant to section 2 (a) of that Act, respondent's land was appraised at $1,353.01, about $8.00 an acre (see R. 42). On April 3, 1946, as a condition precedent to the delivery of water to the land, Mr. and Mrs. Douglas made with the United States the contract (R. 40–42) required by section 2 (b). This contract incorporated by reference Articles 5–17 of the contract made by the United States with Norman P. and Edith R. Lawson (R. 45–64). Thus, respondent

and his wife (now dead) agreed (Article 10 of the Lawson contract, R. 60) that "in the period from [April 3, 1946] and to a date five (5) years from the time that * * * water is available * * * [they] shall make no conveyance of or contract to convey a freehold estate in the subject lands * * * for a consideration exceeding their appraised value." Water could not have been delivered to the Douglas land until 1954 (R. 275). Therefore, it could not have been sold before 1959 for more than $1,353.01. The condemnation proceeding began in 1951.

This was a test case. At the outset of the trial, the Government moved for a directed verdict for not more than the amount provided for in the contract of April 3, 1946 (R. 128–129). The motion was denied (R. 129). In consequence, the case was tried on the trial judge's theory that the contractual limitation upon the price at which respondent could sell was to be disregarded and that just compensation was to be whatever amount he could have obtained for the land as increased in value by the future right to receive water from one who would be bound by the appraised price during the period stipulated in the contract (R. 8–10, 169–171, 291, 297, 400–402, 502–503).

In obedience to this theory, Government witnesses valued the land—at the most—at about $25 an acre (R. 311, 403, 437), and the witnesses for

the landowner valued it at from $80 to $100 an acre (R. 369, 468, 490).[1]

Pursuant to this theory, the trial court instructed the jury (R. 502–503) that:

> You are to value the land with its irrigation potentialities as they existed at the time of taking under the contracts just mentioned. In other words, you are to value this land with the contract water rights to which it was entitled under the contract, bearing in mind that the water was to be brought to the land in the future under the terms and conditions of the contracts.

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[1] Over respondent's objection (R. 202–203), the Government introduced evidence of prices realized October 2, 1951, by the State of Washington at an auction of 3,100 acres of state lands which were within the project (R. 210). This evidence was introduced because the State was the only holder of land in the District falling within the trial court's theory. This was so because the Columbia Basin Project Act limited water rights to nominal quarter sections (about 160 acres) and required a landowner to contract with the United States to sell the excess for its appraised value. But a provision of its constitution required the State to sell its lands at public auction to the highest bidder and so prevented it from agreeing to sell all but 160 acres at the appraised value. In consequence, the Act was amended September 27, 1950, to provide that "the purchaser of such State lands, his heirs and devisees, if otherwise qualified to execute a recordable contract, shall not be disqualified to execute such contract by reason of the amount of the purchase price paid or to be paid to the State for such lands." 64 Stat. 1074. See Senate Report No. 2498, 81st Cong., 2d sess. Those at the auction were told that, in order to secure water from the project, they would have to enter into the contracts required of all other owners desiring water (R. 213).

> In determining market value on the basis of this theoretical buyer and this theoretical seller, you should assume that the sale was to be made of the land together with the contract water right under the contracts pertaining to the land, with all the advantages and disadvantages that go with them. *You should assume, however, that the seller would be free to sell for whatever price he could obtain from the theoretical or imaginary buyer, without being limited or bound by the appraised value placed upon the land by the Reclamation Bureau.* The theoretical buyer, however, would as of the date of taking, so far as the contracts are concerned, step into the shoes of Mr. Douglas and would be entitled to all the benefits and subject to all the burdens and disadvantages of the contracts. The buyer could not, of course, resell for more than the Reclamation Bureau appraised value within five years after the water for irrigation became available to the land. [Emphasis added.]

The jury returned a verdict of $9,365.03 or about $57.50 an acre (R. 24), upon which judgment was entered (R. 24–27). The court of appeals affirmed (R. 516–521).

REASONS FOR GRANTING THE WRIT

In approving an award for more than the appraised value of the land, the maximum sale price permitted by the Columbia Basin Project Act, the court of appeals has allowed an improper

element of "retention value" as part of just compensation. It adds to the price of respondent's land the value of a wholly speculative right, ignoring the facts that (1) the right was coupled with an obligation precisely precluding the addition of any such value, and (2) the right was granted by the Government and was subject at all times to extinction by the Government, which is here called upon to pay for it. Because the decision is, in our view, at war with the principles of just compensation, and because this test case will affect condemnation suits involving some 39,000 additional acres—and will lead, if unreversed, to about $2,000,000 in added payments for the lands in question—we submit that this Court should grant review.

1. Respondent's land, which was not in use when taken and had not been used since 1914, had been appraised at $1,353.01—about eight dollars an acre. It has never been suggested that this appraisal was too low for the land in its natural state, apart from the water to come from the federal project. Although the Columbia Basin Project Act (sec. 2 (a) (i)) provides for a reappraisal at any time upon the request of the landowner, consideration to be given to proper items of value "other than increments on account of the construction of the project," no reappraisal was ever sought. Thus, excluding any increment because of construction of the irrigation project, the record permits only the conclusion that the

appraisal represented the fair value of the land. And it was this appraised value which the Project Act set as a maximum sale price at the time of the taking.

The amount awarded by the courts below—57 dollars rather than eight per acre—exceeds this appraisal solely because of the irrigation potentialities of the land accruing as a result of the Government's project in that area. Though Congress, and respondent's contract, specifically prohibited addition of this speculative factor to the price of the land at the time it was taken, the courts below found the prohibition irrelevant in determining the price to be paid by the Government as just compensation. Discarding the statutory and contractual maximum, they ordered payment to respondent based upon conjecture as to the land's value if and when it should be irrigated, and when, eight years later, the maximum price restriction would have been lifted. Respondent received, in short, an award for a supposed "retention value", a future enhancement in value attributable to the benefits of the federal reclamation project.

In our view, however, far from suggesting the kind of "exceptional circumstances * * * which would justify resort to evidential forecasts of potential future values in order to determine present market value" (*United States* v. *Commodities Corp.*, 339 U. S. 121, 126), this case is peculiarly appropriate for application of the principle that

"the normal measure of just compensation has been current market value; retention value has never been treated as a separate and essential factor." *Ibid.* Here, the very contract which gave rise to the expectation on which the "potential future value" of respondent's land was based forbade present realization of any hoped-for enhancement. The contract warned, moreover, that the enhancement might never be realized; the Government retained the power to withdraw respondent's land from the irrigation project, nullifying the contract, and completion of the project remained subject at all times to failure of appropriations by Congress.[2] Thus, it is as true here as it was in the *Commodities Corporation* case that "the highly speculative nature of proof to show possible future prices" argues decisively against addition to just compensation of a factor of "retention value." 339 U. S. at 126.

It may be true that speculators would be prepared to gamble on the hope that respondent's land would become more useful through irriga-

[2] The contract between respondent and the Government provided that its provisions should "be inoperative: (a) as to any part of the subject lands which are excluded from the lands within the project, from the date of the exclusion; and (b) as to any part of the subject lands which the Secretary determines are not to be irrigated from, through or by means of the project works, from the date of such determination." (R. 63.)

The contract also made the obligations of the United States "contingent upon Congress making the necessary appropriation for their fulfillment." (R. 64.)

tion. But Congress, limiting the price at which respondent could sell to the appraised value, foreclosed such speculation.[3] Congress made a statutory application of the fundamental principle that "The owners ought not to gain by speculating on probable increase in value due to the Government's activities." *United States* v. *Miller,* 317 U. S. 369, 377. The fact, referred to by the court below (fn. 6, R. 518), that the land is here condemned for an Atomic Energy project rather than for the irrigation project itself, does not render this principle inapplicable since there is involved an express Congressional limitation upon the realization by the landowner of enhancement directly resulting from the benefits conferred by the irrigation project rather than simply the elimination of incidental enhancement due to proximity to the project. Contrary to this legislative mandate, the decision below in effect compels the Government to pay for benefits the Government proposed to confer on the landowner but retained power to withhold. On the Government's view, the condemnation proceedings have simply frus-

[3] The reference by the court below (R. 521) to auction sales of lands belonging to the State of Washington is significant only if it is concluded that the maximum price provision required by the statute and contract could be ignored. Since the State of Washington was not bound by an agreement not to sell above the maximum price, it could profit by speculators' anticipations of enhanced values. But it was precisely such gains which were forbidden to respondent and other private landowners.

trated respondent's defeasible expectation of securing the benefits of the federal irrigation project, and the Government should not have to pay for defeating this type of anticipation. Cf. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–283.[4]

2. Resolution of the issue is important in the conduct of federal condemnation proceedings. This was a test case to determine the measure of compensation for the taking of lands governed by the provisions of the Columbia Basin Project Act. Some 39,000 acres of such lands have been condemned for use by the Atomic Energy Commission. The award for those lands of an equal amount above their appraised value would increase the cost of the project by more than $2,000,000. And the consequences of the decision may be much greater since the Columbia Basin Project embraces 922,000 acres of land under such contracts. Moreover, the decision may have much

[4] The decision in *Westchester County Park Commission* v. *United States*, 143 F. 2d 688 (C. A. 2), does not, as the court below thought (R. 519), support its conclusion. That case applied the usual standard of market value, as indicated by sales of comparable properties in the vicinity, and rejected the condemnee's claim to more than market value, a claim based on the fact that its deed prevented sale of the property without the State's consent. Here, respondent was not under a limitation "personal to him" (R. 521) which resembled those upon infant or otherwise incompetent landowners. Every landowner in that area expecting water from the irrigation project was bound by a contract similar to respondent's. All comparable land was therefore under the same disability.

more widespread results because of its possible effects on cases where there is involved the provision generally applicable to reclamation projects requiring the sale at appraised value of irrigable lands held by one owner in excess of 160 irrigable acres. Section 46 of the Act of May 25, 1926, 44 Stat. 636, 649, 43 U. S. C. sec. 423e.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

FEBRUARY 1954.

APPENDIX

So far as material, the Columbia Basin Project Act, as amended March 10, 1943, 57 Stat. 14, 16 U. S. C. sec. 835 *et seq.*, enacted to prevent "speculation in lands of the Columbia Basin project," provides:

> SEC. 2 (a) No part of the funds * * * appropriated or allotted for [Columbia Basin] project construction or for the reclamation of land within the project shall be expended in the construction of any irrigation features of the project, * * * until the requirements of the following subdivision (i) and (ii) of this subsection (a) have been met:
>
> (i) All lands within the project shall have been impartially appraised by the Secretary of the Interior * * * and evaluated at the date of appraisal without reference to or increment on account of the construction of the project. Reappraisals may be made at any time by the Secretary, and will be made upon the request of the landowner * * *. In such reappraisals the Secretary shall take into account, in addition to the value found in the first appraisal, improvements made after said appraisal, such irrigation construction charges on the land as have been paid, and other items of value that are proper, other than increments on account of the construction of the project. * * *
>
> (ii) Contracts shall have been made with irrigation, reclamation, or conservancy districts organized under State law embracing

the lands within the project providing for payment thereby of that part of the cost of construction of the project determined by the Secretary to be the part thereof to be repaid by irrigation. * * *

(b) (i) The lands within the project shall be developed in irrigation blocks, * * *. The Secretary shall segregate the lands in each irrigation block into farm units * * *. No farm unit shall contain more than one hundred and sixty or less than ten acres of irrigable land, except that any nominal quarter section comprising more than one hundred and sixty acres of irrigable land may be included in one farm unit, * * *.

* * * * *

(iii) Water shall not be delivered * * * to * * * lands not conforming * * * to the farm units covering the lands involved * * *.

(iv) Lands within the project in excess of one farm unit held by any one landowner shall * * * be deemed excess land: * * *.

* * * * *

(v) * * *

(c) As a condition precedent to receiving water from the project and in consideration thereof, each landowner shall be required to execute, within six months from the date of the execution of the contract between the United States and the district within which the land is located, a recordable contract covering all his lands within that district, * * *.

Each such recordable contract shall provide—

(i) That the landowner will conform his lands * * * to the area and boundaries of the pertinent farm unit or units shown on the plats filed under subsection 2 (b) and

will dispose of excess land * * * at its appraised value; that the Secretary is thereby given an irrevocable power of attorney to sell in behalf of the landowner any such excess land at said appraised value; and that the United States is thereby given * * * an option to buy any such excess land at said appraised value: * * *.

(ii) That in the period from the date of execution thereof and to a date five years from the time water becomes available for the lands covered thereby, no conveyance of or contract to convey a freehold estate in such lands, whether excess or nonexcess lands, shall be made for a consideration exceeding its appraised value, and * * * the grantor or vender or the grantee or vendee or any lien holder thereof shall, within thirty days from the date of such conveyance or contract, file in the office of the county auditor in the county or counties in which the land is located an affidavit describing * * * the consideration therefor.

(iii) That in the event that within such period such a conveyance of, or contract to convey, is made without filing within said thirty days the affidavit required * * * or is made for a consideration in excess of the appraised value, the Secretary * * * may cancel the right of such estate to receive water * * *.

* * * * *

SEC. 3 (a) Fraudulent misrepresentation as to the true consideration involved in the conveyance of, or contract to convey, any freehold estate in land covered by a recordable contract * * * in the affidavit * * * shall constitute a misdemeanor punishable by a fine not exceeding $500 or by imprisonment not exceeding six months, or by both * * *.

(b) Should any freehold estate in lands subject to the recordable contract * * * be conveyed or contracted to be conveyed, after the date of execution of such recordable contract and within five years from the time water becomes available for such lands, at a consideration in excess of the appraised value of said estate, the transaction * * * shall be invalid and unenforceable by the vendor or grantor, * * * as to that part of the consideration in excess of the appraised value * * *. * * *

The vendee or grantee * * * at any time within two years from the date of any such conveyance or contract and on filing a correct affidavit * * * may recover * * * an amount equal to the payments made in excess of the appraised value.

In connection with any judgment or decree hereunder in favor of a vendee or grantee, said vendee or grantee shall have the right to recover court costs and reasonable attorneys' fees.

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